

# ARKANSAS SUPREME COURT

No. CR 06-422

NOT DESIGNATED FOR PUBLICATION

KHAMPBANG PHIATHEP  
Appellant

v.

STATE OF ARKANSAS  
Appellee

Opinion Delivered November 2, 2006

APPEAL FROM THE CIRCUIT COURT  
OF CRAWFORD COUNTY, CR 2003-  
450, HON. MICHAEL MEDLOCK,  
JUDGE

AFFIRMED.

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## PER CURIAM

The Arkansas Court of Appeals affirmed a judgment in which appellant Khampbang Phiathep was found guilty by a jury of delivery of methamphetamine and possession of a counterfeit substance with intent to deliver, and was sentenced to 360 months' imprisonment. *Phiathep v. State*, CACR 04-1273 (Ark. App. May 4, 2005). Appellant timely filed in the trial court a petition for postconviction relief under Ark. R. Crim. P. 37.1, which was denied. Appellant now brings this appeal of that order.

Appellant's only point on appeal is that the trial court erred in not finding trial counsel provided ineffective assistance. Appellant argues that trial counsel was ineffective for failure to advise him of amendments to the information that occurred shortly before trial, for failure to discuss defenses to the new charges with appellant or request a severance of the charges or a continuance to further prepare for trial, and for a general failure to communicate with his client. The order denying postconviction relief found that the arguments presented did not show counsel's

performance was deficient or that but for counsel's alleged errors a different outcome would have resulted.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). Under the criteria for assessing the effectiveness of counsel as set out in *Strickland*, when a convicted defendant complains of ineffective assistance of counsel, he must show first that counsel's performance was deficient through a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. Additionally, the petitioner must show that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*).

We first note that appellant's brief is deficient in that he has failed to abstract his trial. Our standard of review on claims of ineffective assistance of counsel, as noted above, requires a summary of all of the evidence presented at trial. While the State did not file a motion to require appellant to supplement his brief or otherwise raise the issue, this court may still require rebriefing pursuant to

Ark. Sup. Ct. R. 4-2(b)(3).<sup>1</sup> Because it is clear from the record before us that appellant could not prevail, we do not provide an opportunity for him to supplement the abstract and we affirm the denial of postconviction relief. This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (*per curiam*); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*); *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994) (*per curiam*); *Reed v. State*, 317 Ark. 286, 878 S.W.2d 376 (1994) (*per curiam*).

Appellant carried the burden of proof to show both error by trial counsel and that those errors prejudiced the outcome of his trial. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, the petitioner must show that there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, *i.e.*, that the decision reached would have been different absent the errors. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Greene*, 356 Ark. at 64, 146 S.W.3d at 876. Here, appellant first contends that absent counsel's errors in failing to advise him of the amended charges, he would have accepted the plea offer and received a lesser sentence.

A brief summary of the evidence presented at trial as set out in the opinion by the court of appeals affirming the judgment is sufficient for purposes of our decision here. The charges resulted

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<sup>1</sup>Whether or not the appellee has called attention to deficiencies in the appellant's brief, this court may address the question at any time. If the abstract or addendum is so deficient that we cannot reach the merits of the case, or to do so would cause unjust delay, then this court may notify appellant that he will be afforded an opportunity to file a substituted brief in conformance with Rule 4-2(a)(5) and (8), at his own expense. If, after the opportunity to cure the deficiencies, appellant once again fails to file a complying brief within the prescribed time, the judgment may be affirmed for noncompliance.

following two attempts by the police to have a confidential informant buy drugs from appellant.

An investigator with the 12<sup>th</sup> and 21<sup>st</sup> Judicial Drug Task Forces met with the confidential informant and arranged the first controlled buy from appellant. The investigator and another officer observed an exchange between appellant and the informant. Afterwards, the officers secured the substance provided by the informant and the Arkansas State Crime Laboratory tested the substance and confirmed that it was methamphetamine.

The police officers then arranged a second controlled buy. Before that buy was completed, the officers arrested appellant and seized a substance appellant was holding. Appellant stated that the substance was not “dope,” but MSN, and that he planned on ripping the informant off. This substance was also sent to the crime lab and was confirmed as dimethyl sulfone or methyl sulfone (MSN), a common substance used to cut methamphetamine.

At the postconviction-relief hearing, the trial court heard testimony from appellant and trial counsel about discussions between them concerning a plea offer by the State. Appellant was originally charged with possession of methamphetamine with intent to deliver. Counsel testified that he had received the report indicating that the second substance tested was not methamphetamine, and was aware that the State would also have received a copy of the same report. Although appellant testified to the contrary, counsel stated that he discussed with appellant the possibility that the State would amend the charges because of the test results. Counsel said that he was aware of the earlier controlled buy because of the police report, and had already discussed the facts with appellant and prepared to address testimony concerning that buy in anticipation of possible testimony from the informant. He indicated appellant was unwilling to accept the plea offer because he did not wish to accept an offer that included jail time. He also indicated that the State withdrew the plea offer when

the information was amended.

Appellant testified that counsel had not advised him that the prosecution could amend the charges. Appellant stated that they had not discussed any defense to a delivery charge. He testified that counsel advised him that there was a good chance the State would not be able to prove its case on the possession of methamphetamine charge because the substance was not methamphetamine, and that he would have taken the plea agreement if he had been advised of the amended charges.

The trial court obviously did not find appellant's testimony credible. The order indicates that the court found that appellant did not show that the outcome would have been any different. We cannot say that those findings were clearly erroneous. Counsel testified that he had a number of conversations with appellant. Counsel testified that the plea offer was withdrawn before the amended charges were filed, and that he had discussed the possibility of the amendment with appellant. Because the trial court found that testimony more credible than appellant's, appellant failed to show that counsel failed to appropriately communicate with him or that he would not have rejected the plea offer if he had been advised of the amendment of the information. The judge at a postconviction-relief hearing is not required to believe the testimony of any witness, particularly that of the accused. *Skeels v. State*, 300 Ark. 285, 779 S.W.2d 146 (1989).

As to appellant's contention that counsel failed to discuss defenses with him and failed to seek a severance or continuance, the State argues that the issue was not raised below. There was testimony at the postconviction relief hearing concerning counsel's decision not to request a continuance, however, and the order denying postconviction relief notes that trial counsel stated that he was not surprised by the amendment of the charges and that it did not affect his trial preparation. If the issue is now properly before us, appellant has not presented any evidence that the outcome of

the trial would have been different had a severance or continuance been received.

While appellant asserts that counsel would have prepared differently, counsel testified that he was adequately prepared based upon the particular circumstances of the case. Further, appellant does not indicate what additional evidence might have been presented or how counsel would have been better prepared following a severance or continuance. Because appellant failed to make the required showing of prejudice, he has failed to show that counsel was ineffective.

Appellant makes additional vague arguments that trial counsel's conduct was so outrageous that it should shock the conscience of this court, and that "every attorney who has looked at this case has felt that the performance of the defense counsel fell below the professional norms." He argues that we should reverse on that basis. He does not, however, offer more than these conclusory statements in support of this assertion. Conclusory statements cannot be the basis of postconviction relief. *Jackson*, 352 Ark. at 371, 105 S.W.3d at 360. Nor does appellant further develop the argument as one of fundamental error or attempt to develop an argument as to why the particular circumstances of this case merit an exception to the *Strickland* standard. We do not research or develop arguments for appellants. *Hester v. State*, 362 Ark. 373, \_\_\_ S.W.3d \_\_\_ (2005).

It is clear on the record before us that appellant did not make a showing of the error or prejudice as required, and we agree with the findings of the trial court that trial counsel was not ineffective. Because the trial court was not clearly erroneous in its findings, we affirm the order denying postconviction relief.

Affirmed.